IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-1

TRICE EUGENE MORRILL, PETITIONER

-vs-

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Hammond, Indiana
(219-931-1700)

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on March 3, 1975, petition for rehearing denied on March 24, 1975.

OPINION BELOW

The opinion of the Court of Appeals is unpublished. It affirmed a judgment of conviction of petitioner for theft from an interstate shipper in violation of 18 U.S.C. §659 (Count I) and receiving and concealing property exceeding a value of five thousand dollars ($5000.00) which was in interstate transit in violation of 18 U.S.C. §2315 (Count II). Petitioner was tried in the District Court by a jury and there is no opinion of that Court.

JURSIDICTION

The judgment of the United States Court of Appeals was entered on March 3, 1975, petition for rehearing denied on March 24, 1975. Jurisdiction of this Court is involved under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I

Was it error for the Court below to affirm the District Court's sustaining of a Government objection directed at Petitioner's questions to an alleged accomplice of the Petitioner regarding the difference in penalties between the felony the accomplice was originally charged with and the misdemeanor subsequently pleaded guilty to by the accomplice in exchange for testimony against the Petitioner?

II

Was this derogation of Petitioner's right of confrontation of his accusers pursuant to the Sixth Amendment?

III

Was it further error for the Court below to affirm the District Court's decision even though the entire subject of a "deal" was brought up by the government on direct examination?

IV

Was the Court below in further error in its order in that this order conflicts not only with other Circuits but with this Court as well?

V

Was the Court below in error by affirming the District Court's denial of Petitioner's Motion for Judgment of Acquital as well as the Motion for a New Trial?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnessess against him."

STATEMENT OF THE CASE

The defendant was charged in a two count affidavit with violation of Title 18 U.S.C. Secs. 659 and 2315 --possession of chattels of a value in excess of one hundred dollars ($100.00), and receiving television sets of a value of more than five thousand dollars ($5,000.00). Trial by jury was commenced on May 2, 1974, and was concluded on May 3,

1974. The jury returned a verdict of guilty as to each count. On May 10, 1974, defendant filed his "Motion for Judgment of Acquittal Notwithstanding the Verdict, and in the Alternative, for a New Trial", which was denied on August 6, 1974, the court entered judgment and imposed a sentence of seven (7) years imprisonment as to count one and a fine in the sum of two thousand dollars ($2,000.00), and withheld judgment and placed the defendant on probation for a period of three (3) years as to count two with the period of probation to commence at the termination of the imprisonment imposed under count one. Thereafter, on August 29, 1974, the defendant filed his Notice of Appeal from the Judgment.

The events giving use to this Petition occurred during the trial of the Petitioner, the government's chief witness, Anthony Sedita was charged with the same violations of 18U.S.C. as Petitioner, on facts arising out of the same occurance, i.e. Sedita was an accomplice. Prior to his testimony Sedita made a "deal" with the Government that he would testify against Petitioner if the charges were reduced to a misdemeanor, which they were. The penalty for the felony originally charged was ten (10) years, that for the misdemeanor one (1) year. On redirect the Government brought

up the subject of the "deal". On recross the Government objected to a question posed by Petitioner's Counsel asking Sedita to recite the difference between the penalty for the felony and the one for the misdemeanor. The Government's objection was sustained by the District Court. An offer to prove relevance was made by Petitioner's Counsel, but was denied by the District Court.

The defendant produced two (2) eye-witnesses, one being the wife of Sedita, who was present on the night the facts giving rise to the charges against Petitioner and Sedita arose, the other a nephew of Sedita, who was also present. Both testified that Petitioner was not one of the men at Sedita's house on the on the night in question. Further, Sedita testified that on the evening in question, a white Marcus Rental truck arrived at his home and one of the three men in the truck began to unload television sets. Sedita testified that Petitioner was one of those men.

An employee of Marcus Rental Trucks testified that Petitioner rented an 18 foot van truck two days before the night in question, he further testified the truck had a white cab and a red box. Another employee of Marcus Rental Company testified that Marcus Rental Company had

six trucks fitting the description of the truck rented by Petitioner, two (2) having a white cab and a red box, four (4) having a red cab and a white or silver box.

REASONS FOR GRANTING WRIT

I

Conflicts between the
Circuits and Failure to
Follow binding Precedents

The right to cross-examine is basic to every defendant. The Ottawa 3 Wall. 268, 271; Alford v. U.S. 282 U.S. 687, 691; Pointer v. Texas 380 U.S. 400, 405. The Sixth (6th) Amendment provides for confrontation of every witness by the accused. Included in the Sixth (6th) Amendment is the right to vigorously cross-examine those who would testify as to the criminality of the defendant. Alford v. U.S., supra.; Davis v. Alaska 415 U.S. 308; Farkas v. U.S. 2 F.2d 644 (6th Cir.). This includes those witnesses to whom money has been paid, or leniency offered by the Government in exchange for the witness's testimony. These factors go directly to the credibility of the witness. The jury, in order to evaluate and weigh the credibility of the witness in every possible light, must be aware of every facet of information prompting the witness to so testify in arriving at a correct verdict. Central to this question of credibility is the difference in penalty between the felony originally charged and that of the misdemeanor to which the government's key witness subsequently pleaded guilty in exchange for his testimony against the defendant. The promise of leniency is subject to cross-examination in order to vividly portray the state of the witness's mind and the motive for his testimony. Alford v. U.S., supra.; Farkas v. U.S., supra.

Exposure of the witness's motivation is not only proper, but important to the Constitutionally protected right of cross-examination. Davis v. Alaska, supra.

Our long history of presumption of innocence requires that the defendant be able to question the credibility of a witness against him, and it becomes all the more vital when the witness is a paid informer or, as in the instant case, when the charge against the witness originally arose from the same facts which are alleged to be the basis for the charge against the defendant, i.e., when the witness is an accomplice and that witness's testimony is crucial to the Government's case, Harris v. U.S. 371 F.2d 265 (9th Cir.).

In the instant case the Government's chief witness was charged with the same felony as the Petitioner. The witness, however, managed to arrange a "deal" with the Government whereby he would testify against the Petitioner in exchange for pleading guilty to a misdemeanor. Not only does the Petitioner have an absolute right to question this witness's credibility, but the entire question of a "deal" arose as a result of redirect examination by the Government. Since the Government saw fit to bring this agreement into the open, it was the right of the defendant on cross-examination to go into every aspect of the "deal", including the difference in penalties between the felony which was originally charged and the misdemeanor subsequently pleaded guilty to by the witness. Philadelphia & R. Ty Co. v. Stimpson, 14 Pet. 448.

By affirming the District Court's decision regarding the sustaining of the Government's objection to defense counsel's questions about the penalties involved, the Court below ignored decisions of this Court and clear decisions of other Circuits which are binding precedent. The questions and responses to the questions by the Government and the District Court are as follows:

On redirect examination, the United States Attorney asked:

> "In reference to the agreement which you and I reached, lowering your indictment to a misdemeanor, why did you make that agreement? Why did you want to make that agreement?" (Record, p. 129; emphasis supplied).

On recross examination by Petitioner's counsel:

"Q In your deal, was it explained to you what the sentence was for a felony and what the sentence is for a misdemeanor?

A Yes, it was.

Q. So you did talk about that. And what is the difference between the two?

MR. GRADY: Your Honor, I object to this. The difference between the two sentences I don't believe is material to the issues.

THE COURT: No. And it wasn't gone into.

MR. GRADY: And it wasn't gone into, you're right--

THE COURT: I'm going to sustain your objection on that.

MR. GRADY: (Continuing) --on redirect examination.

THE COURT: It's not relevant evidence, anyway.

MR. ENSLEN: May I approach the bench.

THE COURT: You may.

(Discussion between Court and counsel at the bench, outside the hearing of the jury, as follows:)

THE COURT: The basic reason for my ruling was that that subject was not gone into on redirect examination. Now, that's the basic reason for my ruling.

MR. ENSLEN: I submit to the Court that it was gone into when he said, "Why did we make this agreement?" That opens up the entire thing. I objected to that and I was overruled.

MR. GRADY: I believe he answered that question as to why he made it.

MR. VAN BOKKELEN: Your Honor, one additional reason, this brings up the penalty.

THE COURT: Yes. I'm going to exclude it on the grounds that it's a discussion of penalty that's got no place before the jury under any circumstances.

MR. ENSLEN: I would offer to prove, your Honor, that the promise of a lesser sentence is the influencing factor in this witness' mind to making the deal, and that would probably be an inference that the jury can draw.

THE COURT: Well, you've made that point. I'm just not going to let you get into the amount of penalty in the case.

MR. ENSLEN: Yes."

(R. 138, L. 8-137, L. 12)

Clearly, the questions should have been permitted.

Further, not only is the witness's credibility subject to attack, but any motives he might have for so testifying are quite vital to his decision to testify. Central

to this entire issue of credibility in the instant case is the difference in penalties between a felony and a misdemeanor. Kotteakos v. U.S., 328 U.S. 750, 765; Beuadine v. U.S., 368 F.2d 417, 423-424 (5th Cir.). At issue in the instant case is a motive far more important to the witness than money -- years of his life, which can never be recouped. If a paid informer, who is merely taking money in exchange for testimony can be vigorously cross-examined as to motive, Harris v. U.S., supra., then surely one who is trading nine years of incarceration should be as closely examined!

The jury is entitled to know how many years the defendant traded, just as it would be entitled to know the amount of money paid to an informer. Davis v. Alaska, supra. This goes straight to the heart of his motive and, hence, his credibility. It is not a sufficient protection of the Petitioner's rights guaranteed by the Constitution that the witness in the instant case merely state to the jury his awareness of the difference between the penalties for a felony and a misdemeanor. The average juror is not a lawyer and the words "felony" and "misdemeanor" are virtually meaningless to him. Placed in the context of ten years versus one year, the motive of the witness would become quite vivid for the jury, and, in so doing, the jury has a true measure with which to evaluate the witness's motive and thus, his credibility. The result is a fair and equitable verdict, not only to the

defendant, but to the judicial system as well. Little is gained by the State when an individual is convicted because of jurisprudential "short-cuts" or limitation of fundamental rights as in the instant case.

The order of the Court below is in conflict, not only with the decisions of other circuits, Wheeler v. U.S. 351 F.2d 946 (1st Cir.), Furlong v. U.S. 10 F.2d 492, 494 (8th Cir.), U.S. v. Hogan, 232 F.2d 905 (3rd Cir.), Farkas, supra.; Harris, supra.; Beaudine, supra.; and in one instance its own; U.S. v. Amabile, 395 F.2d 47, 50 (Swygert, J.) dissenting, but with the decisions of the Court; The Ottawa, supra.; Pointer v. Texas, supra.; Alford, supra.; Davis v. Alaska, supra.; Philadelphia & R. Ty Co. v. Stimpson, supra.; Kotteakos, supra. and with the District Court's instruction number 25 in the instant case which is as follows:

> "You as jurors, are the sole judge of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case ...
>
> "On the basis of these considerations, and your experience and relations with mankind, you should give the testimony of each witness such weight as you think it deserves." Instruction 25. (Emphasis supplied).

Constitutional jurisprudence requires that this Court establish the parameters for cross-examination of a witness when that witness's credibility is questionable as in the instant case, resulting from his connection in the same fact situation giving rise to the charges against the Petitioner. To do otherwise is to severely limit the Petitioner's right guaranteed not only by the Sixth Amendment, but by the "due process" clause of the Fifth as well.

It is, therefore, the contention of the Petitioner that he was denied fundamental Constitutional rights by the Court below in its order sustaining the District Court's decision to prohibit Petitioner from going into the question of the difference in penalties between the felony originally charged against the Government's witness, and the

misdemeanor to which a guilty plea was entered in exchange for testimony against the Petitioner. This decision severly limited Petitioner's right to cross-examine and put before the jury the most damning aspect of the question of credibility of this witness, thereby denying him a basic right not only guaranteed by decisions of this Court, but by the Fifth and Sixth Amendments to the Constitution. Furthermore, the Seventh Circuit is the only Circuit which restricts cross-examination in this manner, and is, therefore, not only in conflict with all of the other Circuits, but with the decisions of this Court, thus demanding clarification by this Court.

II

A study of the record reveals that the evidence used to convict Petitioner was nebulous at best. The testimony of an alleged accomplice who was offered a "deal" was all that was introduced by the government which in any way was incriminating to the defendant, and this without Petitioner being permitted to fully cross-examine the witness regarding his motive.

Petitioner brought to the stand the wife of the alleged accomplice who was present on the crucial night in question and who could not identify the Petitioner, yet she was present when the 46 television sets which were the subject to the charges were delivered to the Government witness's house!

Further, the Government proceeded to show that Petitioner rented a truck on the night in question, but there is conflict in testimony regarding the truck actually rented by the Petitioner and the truck seen at the Government witness's home on the night in question. The discrepancy was not clarified by the Government. Further, another witness testified that he saw the men at the Government witness's home on the night in question and the Petitioner was not one of them. Thus, of the three witnesses called whose testimony referred to who was actually present at the Government witness's home on the night in question, the only one to positively state that Petitioner was present was the one who stood to gain most by lying, i.e., the Government's chief witness, and his credibility was not delved into fully because of the objection regarding his motivation. Thus, the Petitioner was convicted on circumstantial evidence of the most reckless kind and his conviction should not be allowed to stand.

The Seventh Circuit has held that in attempting to set aside a judgment of conviction based upon the denial of a Motion for Judgment of Acquittal only one inquiry should be made; is there substantial evidence of probative value viewed in the light most favorable to the government which the jury could find the defendant guilty beyond a reasonable doubt. U.S. v. Thayer, 209 F.2d 534 (7th Cir.). Clearly, the record indicates that there

is more than a reasonable doubt as to Petitioner's guilt, yet the Court below affirmed the District Court's decision to deny a Motion for Judgment of Acquittal even in light of Thayer, supra.

The ruling of the District Court on the Motion for New Trial is subject to review for abuse of judicial discretion. U.S. v. Clancy, 276 F.2d 617 (7th Cir.).

In light of the testimony and the rulings of the District Court the Petitioner contends that it was an abuse of judicial discretion on the part of the District Court to deny Petitioner's Motion for a New Trial, and further, the Court below was in error in affirming the District Court's denial thereof.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
ARGUED January 9, 1975
March 3, 1975

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. JOSEPH SAM PERRY, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. TRICE EUGENE MORRILL, Defendant-Appellant. NO. 74-1716	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. H CR 74-23 ALLEN SHARP, Judge.

ORDER

In a two-count indictment returned February 27, 1974, Trice Eugene Morrill was changed with theft of 46 General Electric portable 10-inch color television sets from an interstate shipment, in violation of 18 U.S.C. § 659 (Count I), and with receiving and concealing stolen property of the value of $5,000 or more, viz., the aforesaid television sets, which were moving as, were a part of, and constituted interstate commerce, in violation of 18 U.S.C. § 2315 (Count II). Morrill pleaded not guilty to both counts. After a two-day trial,

* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

a jury returned a verdict of guilty on both counts. Thereafter Morrill filed a Motion for Judgment of Acquittal notwithstanding the Verdict, and in the Alternative, for a New Trial. On August 6, 1974 the District Court denied the motion. On August 29, 1974, the District Court entered a Judgment of Conviction as charged in the indictment.

Morrill appeals from the order of the District Court entered August 6, 1974, wherein the court denied Morrill's motion for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial, and from the District Court's judgment of conviction entered August 29, 1974. Morrill contends: (1) the District Court improperly limited Morrill's right to cross-examine Anthony Sedita, an identifying Government witness, as to Sedita's interest, bias and motives when the court prevented Morrill's counsel from questioning Sedita as to the difference between the penalty for a felony and the penalty for a misdemeanor, where Sedita had been indicted under the same charges as those under which defendant Morrill was indicted, and had, one day before the commencement of Morrill's trial, entered into a Stipulation of Plea Agreement under the terms of which Sedita's indictment charging a felony violation was reduced to a misdemeanor; and (2) the District Court erred in denying Morrill's motion for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial.

First we shall address ourselves to the question whether or not the District Court committed reversible error in sustaining the Government's objections to defense counsel's questioning Sedita as to the difference between the penalty for a felony and the penalty for a misdemeanor. We have carefully reviewed the record and we find that Sedita's motives for testifying, and the terms of his plea agreement, were clearly brought out by the testimony in the record. For example, Sedita was asked on redirect examination why he wanted to make the plea agreement lowering his indictment to a misdemeanor. He replied, "The misdemeanor charge is a much less charge than a felony." (Tr. 129). Further, Sedita testified on recross-examination that the Government had explained to him what the sentence for a felony was, and what the sentence was for a misdemeanor. (Tr. 135). We agree with the Government that Sedita's testimony had made his motives for testifying abundantly clear to the jury, and that a recitation by Sedita of the difference in penalty between a felony and a misdemeanor would not have added to Sedita's disclosure of his motives for testifying.

Sedita also made it clear, both on redirect and on recross-examination, that the terms of the plea agreement did not require him to identify Morrill. (Tr. 130, 131, 133, 134).

Next we turn to the question whether or not the District Court erred in denying Morrill's motion for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial. Appellant contends that the verdict was not supported by the evidence and was contrary to the weight of the evidence. We must disagree. First, Sedita both on direct and on cross-examination positively identified Morrill as the person who delivered the 46 television sets to Sedita's house. (Tr. 100, 106). Second, several days after the television sets were delivered to his house, Sedita selected a photograph of Morrill from an array of photographs of seven different persons as the photograph of the man Sedita thought had delivered the television sets. Third, two days after the sets had been delivered, Sedita was requested to describe the man who made delivery, and he furnished a description which closely fit Morrill. Fourth, the Government's case against Morrill was buttressed by the evidence, albeit circumstantial, of the restaurant receipt found in Morrill's residence, on which receipt there had been written television model numbers which coincided not only with a portion of the model numbers of the sets stolen from the railroad years, but also with the size, description and number of each type of set in the shipment. Finally, additional circumstantial evidence against Morrill was adduced in the form of the personal telephone number book containing the name and number of James Lentini, who, according to Sedita's testimony, had arranged for Sedita to take delivery of the television sets.

From the foregoing it is clear to this Court that there was substantial evidence to support the verdict, and that the verdict must be sustained. See Glasser v. United States, 315 U.S. 60, 80 (1942), where the Court held that the verdict of a jury must be sustained if there is substantial evidence, viewed in a light most favorable to the Government, to support the verdict.

Appellant contends, however, that Sedita's identification of appellant was contradicted by the testimony of defense witness Lafe Mynes, who testified that he had seen the faces of the three men who were in the truck which had transported the television sets to Sedita's house, and that none of the three men was Morrill. Appellant contends also that the credibility of Sedita's identification of the appellant was further eroded by the testimony of Sedita's wife, Vera. Mrs. Vera Sedita, who had been called as a defense witness, testified on direct examination that she was present when the television sets were delivered to her home on January 30, 1974; that she saw the man who delivered the sets; and that she was in the front room in an "upset" condition. Mrs. Sedita was requested to look at appellant, who then stood up in open court. Mrs. Sedita testified thereupon that she "really couldn't say for sure" whether or not appellant was in her home on January 30, 1974. Mrs. Sedita concluded her testimony on direct examination by saying

that she did not think that the appellant was the man whom she saw. On cross-examination, Mrs. Sedita testified that she was upset at the time the sets were delivered because she had not ever wanted her husband to take the sets; that she could not remember if appellant was the man who delivered the sets; that "it doesn't look like him"; that she was "not sure" whether or not it was appellant; and that she really did not ever get a good look at the man who delivered the sets because she was in the front room "all shook up" and didn't know what she was doing.

As to appellant's contentions regarding the testimony of Lafe Mynes and Vera Sedita, we need only direct attention to the well-settled rule that on an appeal from a judgment of conviction based on a guilty verdict, the reviewing court should not undertake to weigh the evidence or determine the credibility of the witnesses, but must sustain the judgment if there is substantial evidence, taking the view most favorable t-the Government. Glasser v. United States, supra, at 77, 80. As stated hereinbefore, there was sufficient evidence before the jury to support its verdict.

As the appellant himself pointed out, the disposition of a motion for a new trial rests within the sound discretion of the trial judge. We must emphasize that the trial judge's ruling on the motion is subject to review only in the event that he has abused this judicial discretion. United States v. Empire Baking Co., 174 F.2d 16, 20 (7th Cir. 1949), cert. denied, 337 U.S. 959 (1949). We find no such abuse of discretion here.

For all of the foregoing reasons, the Order of the District Court denying defendant Morrill's Motion for Judgment of Acquittal notwithstanding the Verdict and in the Alternative for a New Trial, and the District Court's Judgment of Conviction, are each

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 24, 19 75.

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. JOSEPH SAM PERRY, Sr. District Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States District Court for the Northern District of Indiana, Hammond Divsn.
NO. 74-1716 vs.	)	
TRICE EUGENE MORRILL, Defendant-Appellant.	)	(H CR 74 23)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	No. H Cr 74-23
TRICE EUGENE MORRILL Defendant	)	

ORDER

The Court now considers the written Motion for Continuance of Sentencing filed by the defendant, Trice Eugene Morrill, by his counsel on July 26, 1974.

At the explicit request of the defendant the disposition of this case is now continued from its original setting on August 9, 1974 at 9:30 o'clock A.M. The case is not set for disposition at the next established time for dispositions, namely, August 23, 1974, at 9:30 o'clock A.M.

The Court now takes up for consideration the Motion for Judgment of Acquittal Notwithstanding the Verdict and in the Alternative for a New Trial filed by the defendant on May 10, 1974. Pursuant to the order of this Court entered on June 3, 1974, the United States of America filed its reply thereon on June 24, 1974. The defendant filed its reply to the Government's response on July 2, 1974.

The undersigned Judge of this Court presided at all stages of the proceedings in this case, including the trial, and is thoroughly familiar with the record and the evidence. This Court does not deem it necessary to hear further oral argument in regard to the defendant's motion. Therefore, that part of the defendant's motion filed on July 26, 1974 requesting oral argument is hereby DENIED.

The Court has carefully considered the pleadings and briefs filed by both the defendant and the Government as well as the evidence at the trial and finds that the Motion for Judgment of Acquittal Notwithstanding the Verdict and in the Alternative for a New Trial should be and hereby is DENIED.

Enter August 6, 1974.

/s/ Allen Sharp
JUDGE, UNITED STATES
DISTRICT COURT.

Supreme Court, U. S.
FILED
JUL 7 1975
MICHAEL RODAK, JR., CLERK

No. 74-1336

In the Supreme Court of the United States

OCTOBER TERM, 1975

TRICE EUGENE MORRILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1336

TRICE EUGENE MORRILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in limiting his recross-examination of a government witness and that there was insufficient evidence to support his conviction.

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of possessing property stolen from interstate commerce, in violation of 18 U.S.C. 659.[1] Petitioner was fined $2,000 and sentenced to a term of seven years' imprisonment, to be followed by three years' probation. The court of appeals affirmed (Pet. App. 18-24).

---

[1]The jury also found petitioner guilty of receiving and concealing that property, in violation of 18 U.S.C. 2315, but judgment on that charge was withheld by the court.

On January 12, 1974, three trailer loads of television sets were stolen from a railroad yard in Chicago while en route from Virginia (Tr. 194-198). On January 29, 1974, two individuals, Anthony Sedita and James Lentini, met and made arrangements for the delivery of a number of the stolen television sets to Sedita's home on the next night (Tr. 87-90). Sedita was to sell most of the sets for Lentini and keep several as compensation (Tr. 126-127).

On the evening of January 30, 1974, three men in a large white van marked "Marcus Rental" arrived at Sedita's house (Tr. 90-91). One man, whom Sedita identified as petitioner, carried 46 of the stolen television sets inside (Tr. 100, 102, 106). At the time of the delivery, petitioner was renting an eighteen-foot van with a white cab and a red box from the Marcus Rental Company (Tr. 143, 155, 160). This was the only large white van rented by the company on the night of the delivery (Tr. 144-145).

Two days after the delivery, FBI agents visited Sedita's home to question him in regard to the stolen television sets (Tr. 222). During this visit, Sedita turned over to the agents the stolen television sets still in his possession (*ibid.*). The agents subsequently searched petitioner's home, pursuant to a search warrant (Tr. 225-226). In petitioner's bedroom the agents discovered a slip of paper on which six sets of numbers and letters were written (Tr. 226-227). These numbers matched the model numbers of the stolen television sets; adjacent to three of the model numbers were listed numbers that coincided with the quantities of those respective models that had been stolen from the railroad yard (Tr. 213-218). An address book containing the name and phone number of James Lentini, the individual who arranged for the delivery of the televisions to Sedita, was also seized during the search of petitioner's residence (Tr. 87-89, 239-241).

At trial, Anthony Sedita testified for the government and identified petitioner as the man who had carried the stolen television sets into his home (Tr. 100, 106). Prior to testifying, Sedita had entered into a plea bargain with the government, under the terms of which the charge against Sedita was reduced from a felony to a misdemeanor.

1. Petitioner contends (Pet. 7-15) that he was deprived of his right to attempt to impeach Sedita's credibility when the trial court limited his recross-examination of Sedita by refusing to permit Sedita to testify as to his knowledge of the difference in penalties between a felony and a misdemeanor (Tr. 135).

As the court of appeals noted (Pet. App. 20), however, "Sedita's motives for testifying, and the terms of his plea agreement were clearly brought out by the testimony" (Tr. 110-111, 119, 125, 128-131, 133-135, 137-139). In response to questioning as to his motive for making the agreement, Sedita stated that "[t]he misdemeanor charge is a much less charge than a felony" (Tr. 129). Sedita also stated that the difference in sentences had been explained to him by the government during plea negotiations (Tr. 135). Petitioner's counsel engaged in a full and searching cross-examination of Sedita (Tr. 101-127), and the partial limitation of the scope of recross-examination to exclude inquiry concerning difference in specific penalties between a misdemeanor and a felony was not an abuse of discretion by the trial court. See *United States* v. *Kahn*, 472 F.2d 272 (C.A. 2), certiorari denied, 411 U.S. 982.[2]

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[2]There is no conflict in the circuits as petitioner suggests. The cases cited by petitioner (Pet. 13) simply hold that the details of a plea bargain are an appropriate subject for cross-examination. That principle was followed in this case. Those decisions do not hold that the trial court must permit essentially cumulative recross-examination.

2. Petitioner also contests the sufficiency of the evidence (Pet. 15-17), arguing that Sedita's identification was contradicted by two defense witnesses. The evidence, which is summarized above, was sufficient, however, to support the conviction when viewed in the light most favorable to the government. See *Glasser* v. *United States*, 315 U.S. 60, 80. In addition to the eyewitness identification by Sedita, petitioner was linked to the crime both by his rental of the truck apparently used to transport the stolen television sets to Sedita and by the incriminating evidence that was seized in the course of the search of his residence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

Supreme Court, U. S.
FILED
JUL 21 1975
MICHAEL RODAK, JR., CLERK

No. 74-1336

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

TRICE EUGENE MORRILL, PETITIONER

v.

UNITED STATES OF AMERICA

REPLY TO MEMORANDUM IN OPPOSITION

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1974

TRICE EUGENE MORRILL, PETITIONER

-vs-

UNITED STATES OF AMERICA, RESPONDENT

REPLY TO MEMORANDUM IN OPPOSITION

The Government has consistently missed the legal point contained in the appeal and Petition for Writ of Certiorari. United States v. Kahn (Memorandum for the United States in Opposition, p. 3) is of no help to the Government. In Kahn, 472 F.2d 272 (C.A. 2), cert. den. 411 U.S. 982, the trial court was affirmed in denying further cross-examination of the witness because other, independent documentary evidence, corroborated the testimony of the witness.

In the present instance, on re-direct examination, the Government, for the first time, questioned the witness, Anthony Sedita, concerning his motive in making a deal with the Government. The question asked by the Assistant United States District Attorney trying the case was,

> "Why did you make that agreement? Why did you want to make that agreement?" (Record, p. 129).

On re-cross examination the defendant attempted to enter the wide-open evidentiary door by inquiring into all aspects of the motive of the witness, including the length of time in the federal penitentiary he would potentially save himself. The deal on the Government's part reduced the crime for which the witness had already been indicted to a misdemeanor (having a maximum potential incarceration of only one (1) year) from a felony with a potential penalty of ten (10) years. The witness saved himself nine (9) years in the penitentiary. The consideration of nine (9) years might well have been sufficient to cause the witness to lie as to the identity of the defendant. Alford v. U. S. (1931), 282 U.S. 687, 75 L.Ed. 624, 51 S. Ct. 218; Kotteakos v. U. S. (1945), 328 U.S. 750, 765, 90 L.Ed. 1557; Beaudine v. U. S., 368 F.2d 417, 423-4 (C.A. 5, 1966).

Kahn, supra., is further distinguished because there is no other direct or circumstantial evidence identifying the defendant as the perpetrator of the crime of possession of television sets. All of the other direct evidence as to the identity of the defendant is against the Government's position, including the wife of the witness, Sedita.

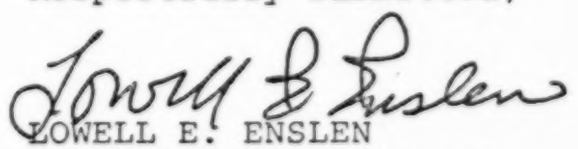
The wife says the defendant was not in her house and not in possession of the television sets. The nephew of the witness, Sedita, said the defendant was not

in the Sedita house and not in possession of the television sets. The husband (Sedita) made a deal with the Government to save himself nine (9) years. The husband is the only person to accuse the defendant of the crime.

A full and complete cross-examination of the witness was not allowed the defendant. The Seventh Circuit in affirming is in conflict with the other circuits, including the Sixth, Ninth, Fifth, First, Third and Eighth. The Seventh Circuit is further in conflict with the Supreme Court in Davis v. Alaska (1974), 415 U.S. 308, 39 L.Ed.2d 347, allowing the right to a broad and searching cross-examination for motive, interest and bias.

The Government has failed consistently to cite any authority to sustain its position, and the Seventh Circuit has not stated any authority to sustain its affirmance. All the law is contrary to the Government's position. Certiorari should be granted and the trial court's judgment reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, LOWELL E. ENSLEN, Counsel for the Petitioner, certify I have deposited in the United States Mail, Air Mail, postage prepaid, forty (40) copies to the Clerk of the United States Supreme Court, and five (5) copies to the Solicitor General of the United States this 16 day of July, 1975.

Lowell E. Enslen

LOWELL E. ENSLEN